



December 6, 1999

Ms. Sara Shiplet Waitt  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR99-3508

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128645.

The Texas Department of Insurance (the “department”) apparently received two requests for information. One request seeks certain “county mutual rate filings for personal passenger automobile insurance coverage” submitted by State and County Mutual Fire Insurance Company (“State and County”) and Southern County Mutual Insurance Company (“SCM”). The second request was never sent to this office, however, based on other correspondence forwarded to us, it appears that the second request sought the same or similar information from State and County. While you raise no exceptions on behalf of the department, you claim that some of the requested information may contain proprietary or property interests of State and County and SCM.<sup>1</sup>

Initially, we note the department’s failure to timely request an attorney general decision. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow if it wishes to ask the attorney general for a decision determining whether requested information falls within an exception to disclosure. Among other requirements, the governmental body “must ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the 10<sup>th</sup> business day after the date of receiving the written request.” Gov’t Code § 552.301. Otherwise, the requested information is presumed to be public information. Gov’t Code § 552.302. You state that the department

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<sup>1</sup>You state that the remainder of the requested information will be provided to the requestor, Ms. Stacey Derden.

received the request for information submitted by Stacey Derden on July 21, 1999. Accordingly, the department's deadline for requesting an attorney general decision in regard to this request for information expired ten business days later on August 4, 1999. *See id.* § 552.301. However, this office did not receive the department's request for an attorney general decision until August 13, 1999. Therefore, the department missed its ten-day deadline. Consequently, absent a compelling reason to withhold the information, the requested records must be released. We find that the documents at issue affect third parties' interests, and therefore a compelling reason exists to overcome the presumption of openness. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Next, correspondence sent to this office indicates that the request for information submitted by Judy Magnuson has been withdrawn. In regard to Ms. Magnuson's request and subsequent withdrawal, you have withdrawn the department's request for an attorney general decision.<sup>2</sup> However, in the department's withdrawal, you only mention Ms. Magnuson's withdrawal letter. You make no mention of Ms. Derden's request for information, which remains the only written request for information ever sent to this office. Accordingly, we can only assume that Ms. Derden's request for information and the department's request for a decision in regard to Ms. Derden's request remain pending.

Pursuant to section 552.305 of the Government Code, we notified both State and County and SCM of their opportunity to claim that the requested information is excepted from disclosure. SCM responded, arguing that the information at issue is excepted under section 552.110 of the Government Code. We have considered the exception SCM raises and reviewed the submitted information.

While State and County sent us an acknowledgment of Ms. Magnuson's withdrawal letter, it has failed to raise any exceptions to required public disclosure. Thus, we have no basis to conclude that State and County's proprietary interests will be harmed by the release of their documents. *See Open Records Decision No. 552 at 5 (1990)* (party must establish *prima facie* case that information constitutes a trade secret); *Open Records Decision No. 542 at 3 (1990)*. Therefore, to the extent that the submitted documents pertaining to State and County's filings are responsive to Ms. Derden's request, the department must release these documents to Ms. Derden.

Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information

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<sup>2</sup>It is only due to Ms. Magnuson's withdrawal that we know of her initial request for information.

obtained from a person and privileged or confidential by statute or judicial decision.<sup>3</sup> The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> This office has held that if a governmental body takes no position with regard to

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<sup>3</sup>The Seventy-sixth Legislature amended the commercial or financial information prong of section 552.110 of the Government Code to provide that it is excepted from public disclosure if "it is demonstrated that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Sess. Law Serv. 4500, 4503 (Vernon) (to be codified as Gov't Code § 552.110(b)). The amendment applies to a governmental body's request for an attorney general decision made on or after September 1, 1999, the effective date of the amendment. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 36, 1999 Tex. Sess. Law Serv. 4500, 4514 (Vernon).

<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

the application of the trade secret branch of section 552.110 to requested information, we must accept a third party's claim for exception as valid under that branch if that party establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

SCM contends that the documents at issue constitute trade secrets. We have reviewed the submitted documents and find that SCM has established, by a *prima facie* case, that the documents regarding SCM's filings are excepted from required public disclosure under the trade secret prong of section 552.110. Accordingly, the department must withhold SCM's documents.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

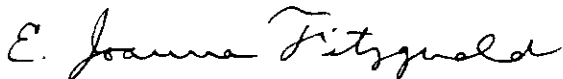
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\nc

Ref: ID# 128645

Encl: Submitted documents

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